APPENDIX

OPINION OF THE COURT OF APPEALS

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 11,202.

National Labor Relations Board,
Appellant,

versus

Hanes Hosiery Division — Hanes Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO. EDWIN M. STANLEY, CHIEF JUDGE.

(Argued June 2, 1967. Decided October 3, 1967.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

Solomon I. Hirsh, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Marion Griffin, Attorney, National Labor Relations Board, on brief) for Appellant, and Whiteford S. Blakeney (Blakeney, Alexander & Machen on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

The National Labor Relations Board sought enforcement in the District Court of its subpoena, or in the alternative a mandatory injunction, against Hanes Corporation to compel production of its personnel and payroll records, or a list in lieu, setting forth the names and addresses of all its employees at its plants near Winston-Salem, North Carolina, who were eligible to vote in a scheduled election to determine whether Textile Workers Union of America, AFL-CIO, Hosiery Division should be their collective bargaining representative. The District Court declined to grant the requested orders and the Board appeals. We reverse.

The production was required by the election order, passed July 19, 1966; compliance was directed by July 26, with the election set for August 17, 1966. As well as providing that the records or list be filed with the Board's Regional Director well before the election, the order also directed him to make the data available to the union and all parties in interest.

Upon word of the corporation's refusal to obey the order, the election was postponed and the Director obtained a Board subpoena duces tecum to effectuate the production, pursuant to Section 11(1) of the National Labor Relations Act, 29 USC 161(1). Despite denial of its petition for revocation of the subpoena, the corporation continued in non-compliance. Thereupon the present suit was instituted by the Board to force this discovery, the plaintiff relying specifically upon Section 11(2) of the Act, 29 USC 161(2),

and generally upon the equity jurisdiction of the District Court, 28 USC 1337.[1] Sustaining the corporation's objections, the District Judge was of the opinion that the Act did not authorize the subpoena, and there was no jurisdiction for an injunction here. His view was that the data demanded was not "evidence" directly touching the certification of a representative. In this we think he erred.

Precedent cited for the contested order was the Board's rule announced in Excelsior Underwear, Inc. et al., 156

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[1]29 USC 161: "Investigatory powers of Board

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 [certification of representatives] and 160 of this title,—

"(1) The Board, or its duly authorized agents or agencies shall at all reasonable times have access to, for the purpose of examination, and the right to copy any *evidence* of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any *evidence* in such proceeding or investigation requested in such application. . . ."

"(2) In case of . . . refusal to obey a subpoena issued to any person, any district court of the United States . . . upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce *evidence* if so ordered, or there to give testimony touching the matter under investigation or in question. . . ." (Accent added).

28 USC 1337: "Commerce and anti-trust regulations

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

NLRB No. 111 (February 4, 1966). There an almost identical order was issued, justified as necessary to "promote the communication of election issues to the employees and to aid in challenging the ballots of employees believed to be ineligible to vote." In this case the question of the rule's validity is narrowed by the corporation's willingness to give the Director the employees' names and addresses in accordance with the prior "normal practice and procedure," that is just before the election and exclusively for the confidential inspection of the Director. This concession confined the use of the information to the Director solely for the ascertainment of those who were qualified to vote; it denied the union the right to retain or copy the list.

The information sought by the Director in this case was in our judgment "evidence" of a "matter under investigation or in question" as contemplated by Section 11 of the Act, 29 USC 161. One of the powers vested in the Board was the certification of employee representatives. Section 9, 29 USC 159. The union's petition for the election invoked this power and engendered, as a reasonable incident, inquiry of who were the prospective balloters and the most advisable means of achieving a just and understanding expression of their preference. "The control of the election proceeding, and the determination of the steps necessary to conduct that election *fairly* were matters which Congress entrusted to the Board alone." (Accent added.) Labor Board v. Waterman S. S. Co., 309 US 206, 226 (1940). It seems to us that the Board could justifiably consider an early release of the qualified voters' names and addresses necessary to an intelligent election.

An informed electorate is essential if the result of an election is to be accorded its intended significance and accomplish its aim. Altogether sound reasons were detailed by the Board for its *Excelsior* enunciation. The argument's logic is too obvious to warrant reiteration.

Contrary to the employer's contention, we do not find the *Excelsior* rule violative of the Act's insistence upon an election "by secret ballot." Section 9(c)(1), 29 USC 159 (c)(1). The balloting itself remains unrevealed; the rule runs only to the pre-election period. Nor does the rule impinge the Act's assurance that the employees "shall also have the right to refrain from any or all . . . activities in connection with collective bargaining." Section 7, 29 USC 157. Nothing is exacted of them. Disclosure to the union of their names and addresses is not an interference with the employees' right to organize as guaranteed by Section 8(a)(1) of the Act, 29 USC 158(a)(1). In truth it is an assist to this end.

Apprehension is expressed by the corporation lest divulgement of the records might expose the employees to harassment by the union organizers in solicitation of support. The answer is that every annoyance of the voters is shunned by the seasoned campaigner, and unions are not novices in this area.

There is fear, too, that the union could dispose of the information for commercial exploitation. The Board may be relied upon to adopt preventive sanctions against any such anticipated abuse, and deter it for the future by fitting penalties. Unveiling the information only on the day of

election or a day or two before, the Board points out quite practically, causes challenges which would not occur if the parties had been pre-advised of the electors' qualifications.

In sum, we think fairness in the elective process demands here, as it does in public or corporate elections, the opportunity of contesting parties to communicate their respective positions to the electorate. This includes such completeness of information, and timeliness of its dissemination, as will allow the voters to make a reasoned choice. The relief prayed in the complaint should be afforded; it may be rested on either Section 11 of the Act, 29 USC 161, or the injunctive powers of the District Court, 28 USC 1337. We remand for such an order by that Court.

Reversed and remanded.

JUDGMENT OF THE COURT OF APPEALS

United States Court of Appeals

FOR THE

FOURTH CIRCUIT

No. 11,202.

National Labor Relations Board,

Appellant,

vs.

Hanes Hosiery Division — Hanes Corporation,

Appellee.

Appeal from the United States District Court for the Middle *District of* North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle *District of* North Carolina, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Middle District of North Carolina, at Greensboro,

for further proceedings not inconsistent with the opinion of the Court filed herein.

FILED
Oct. 4, 1967

Maurice S. Dean
Clerk

ALBERT V. BRYAN
United States Circuit Judge.

A true copy,

Teste:

/s/ Margaret L. Davis,
Chief Deputy Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
WINSTON-SALEM DIVISION

NATIONAL LABOR RELATIONS BOARD, *Plaintiff* vs. HANES HOSIERY DIVISION-HANES CORPORATION, *Defendant*	Civil Action No. C-182-WS-66

JUDGMENT

THIS CAUSE coming on to be heard before the undersigned and being heard upon the plaintiff's Complaint and the exhibits thereto attached, and the Rule to Show Cause heretofore issued by this Court and the defendant's Answer and amendment thereto;

And the plaintiff and the defendant having filed briefs, and the plaintiff a reply brief, all of which this Court has read and considered;

And the Court having heard oral argument by counsel for the plaintiff and counsel for the defendant;

THE COURT NOW FINDS THAT:

The defendant is a manufacturer of wearing apparel, a substantial portion of which moves in Interstate Commerce.

The plaintiff has been conducting a "representation" proceeding, identified in the plaintiff's records as its Case No. 11-RC-2346, the purpose of which is to ascertain whether the employees of the defendant, in the defendant's Winston-Salem, North Carolina, Hosiery Plants, desire to be represented for purposes of collective bargaining by a labor organization or labor Union, namely, the Textile Workers Union of America, AFL-CIO, Hosiery Division.

In the course of such proceeding, the plaintiff issued a Decision and Direction of Election, in which, among other things, the plaintiff directed the defendant to furnish to the plaintiff a list of the names and addresses of the aforesaid employees.

The plaintiff's essential and primary purpose in directing the defendant to furnish such list was to make the same available to the aforesaid labor Union in order that the said labor Union might be thereby aided in contacting and communicating with the aforesaid employees, in its efforts to win support for its cause among them.

The defendant offered to furnish a list of employees to be used in the holding of an election and for purposes of checking voting eligibilities, according to the plaintiff's "normal practice and procedure," but declined to furnish a list of the employees' names and addresses for the use of the Union in communicating with and promoting its organizing efforts among such employees.

The plaintiff thereupon issued a further document, entitled "Subpoena Duces Tecum," again directing the de-

fendant to furnish the aforesaid list of the employees' names and addresses.

The defendant moved before the plaintiff for revocation of this document. The plaintiff denied this Motion, and soon thereafter instituted the present action in this Court.

Upon the foregoing findings and upon all the facts and circumstances before the Court, the COURT CONCLUDES THAT:

The plaintiff's aforesaid directive to the defendant exceeds the plaintiff's lawful authority.

Apart from any question as to whether the aforesaid directive does or does not exceed the plaintiff's lawful authority, the document which was later issued by the plaintiff, entitled "Subpoena Duces Tecum," does not seek the production of any testimony or evidence to prove or disprove any fact or question in issue in any proceeding either before the plaintiff or before this Court. Section 11(2) of the National Labor Relations Act, 29 U.S.C. 161 (2), entitled "Court Aid in Compelling Production of Evidence and Attendance of Witnesses" is therefore not applicable or relevant to the present situation, and this Court is without jurisdiction to enforce the said document, entitled "Subpoena Duces Tecum".

This Court has otherwise no jurisdiction to issue an order requiring the defendant to comply with the directive issued by the plaintiff to the defendant in the plaintiff's "representation" proceeding.

If this Court has jurisdiction to enforce the aforesaid document, entitled "Subpoena Duces Tecum", or if this Court otherwise has jurisdiction to issue an order requiring the defendant to comply with the plaintiff's aforesaid directive, then, and in either such event, the exercise of such jurisdiction is within the sound discretion of the Court, and the Court, in its discretion, hereby declines to issue such enforcement or order.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that the plaintiff's prayer for enforcement of the document entitled "Subpoena Duces Tecum" is hereby denied, and the plaintiff's prayer for an order requiring the defendant to comply with the aforesaid directive, issued by the plaintiff to the defendant, is hereby denied, and the said prayers of the plaintiff are also in the discretion of the Court hereby denied, and this action is hereby dismissed.

This 2 day of December, 1966.

/s/ EDWIN M. STANLEY
United States District Judge